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Nos. 90-954; 90-1004.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,
v.
INMATES OF THE SUFFOLK
COUNTY JAIL, ET AL.,
RESPONDENTS.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM
In No. 90-954

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THIS COURT'S RECENT DECISION IN *BOARD OF EDUCATION OF OKLAHOMA CITY* v. *DOWELL*, WARRANTS SUMMARY DISPOSITION OF THE PETITIONS FOR CERTIORARI FILED WITH THIS COURT.

On January 15, 1991, after the Sheriff of Suffolk County had filed his petition for a writ of certiorari, this Court handed down its decision in *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct. 630 (1991). In *Dowell*, the Federal District Court in 1972 had issued an injunction requiring busing and other measures to ensure compliance by the Board of Education of Oklahoma City with the Equal Protection Clause of the Fourteenth Amendment. The District Court did so after it had found both that residential segregation leading to school segregation had been state imposed and that school segregation itself had led to residential segregation. *Id.* at 633. In 1987, the District Court dissolved the injunction, upon motion of the School Board, after finding both that present residential segregation was the result of private decision making and economic factors and was not a result of former school segregation. *Id.* at 634-635. The Court of Appeals for the Tenth Circuit reversed, holding that the School Board had not met the "grievous wrong" standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). *Dowell*, 111 S.Ct. at 635.

This Court reversed and reinstated the District Court's decision dissolving the injunction. In so doing, this Court first explained why *United States* v. *Swift & Co.*, was inapplicable, and second, defined the standard to apply when considering a request to dissolve an injunction which had been entered to remedy a constitutional violation.

First, this Court, citing *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), noted that the grievous wrong standard of *Swift* had been applied in the context of a continuing

threat of the defendants engaging in the unlawful restraint of trade. *Dowell*, 111 S.Ct. at 636. This Court contrasted the situation in *Swift* with the situation in *Dowell* where the School Board had acted in compliance with the requirements of the Equal Protection Clause of the Fourteenth Amendment and was unlikely to return to its former unlawful conduct. *Id.* at 636-637.

Second, this Court, quoting *Milliken* v. *Bradley*, 433 U.S. 267 (1977), held that, ". . . federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Dowell*, 111 S.Ct. at 637. That is, stated affirmatively, an injunction is proper if its purpose is either to eliminate a condition which violates the Constitution or a condition which flows from such a constitutional violation.

The facts of the present case and the holdings by this Court in *Dowell* limiting the application of the grievous wrong standard of *Swift* and defining the limits of federal injunctions entered to remedy constitutional violations require either a summary reversal of the District Court's decision and the First Circuit's affirmation of that decision denying the Sheriff's motion for modification of the Consent Decree, or, in the alternative, require the granting of the Sheriff's petition for certiorari to clarify what standard should be applied to motions for modification of consent decrees in institutional reform litigation.

A. This Court's Decision In *Dowell* Requires Reversal Of The Denial Of The Sheriff's Motion To Modify The Consent Decree.

In *Dowell*, a federal court injunction was held to be proper where it served the purpose of eliminating a condition which is a violation of the Constitution or a condition which flowed from such a constitutional violation. Here, the Sheriff has

closed the old Suffolk County Jail, where conditions violated constitutional standards, has opened a new Suffolk County Jail, which meets all constitutional standards, and has continued to maintain and operate that jail in compliance with constitutional standards. The only condition of the Consent Decree which the Sheriff has sought to modify, and that in a limited way, is the single-celling requirement, which is not constitutionally required. *Bell* v. *Wolfish*, 441 U.S. 520, 541 (1979). Thus, the Consent Decree in the present case, like the injunction in *Dowell*, has served its purpose of eliminating conditions which are in violation of constitutional standards and of ensuring that the requirements of the Constitution will be met in the future.

Based upon this Court's holding in *Dowell*, therefore, the denial of the Sheriff's motion to modify the Consent Decree should be summarily reversed.

B. In The Alternative, This Court Should Grant The Sheriff's Petition For A Writ Of Certiorari Based Upon Its Holding in *Dowell*.

In *Dowell*, this Court noted that the grievous wrong standard of *Swift* was limited to circumstances where there was a continuing threat by the defendant of unlawful action. There is no contention in the present case, and there can be no contention, that there is a threat that the Sheriff may violate constitutional standards. The old Suffolk County Jail has been closed, a new Suffolk County Jail, which meets constitutional standards, has been opened and has been maintained and operated by the Sheriff in accordance with constitutional standards. The only change in condition which the Sheriff seeks is to double-bunk a certain number of cells in the new Suffolk County Jail, a condition which does not violate constitutional standards.

The Respondent Inmates, Federal District Court and the Court of Appeals all relied upon the grievous wrong standard

of *Swift*. It is clear from this Court's holding in *Dowell* and the undisputed facts of the present case that the application of the grievous wrong standard of *Swift* was mistaken.

Given this Court's holding in *Dowell*, the mistaken application of the grievous wrong standard of *Swift* by the Courts below and the adoption of a "flexible standard" by a majority of the circuits, the Sheriff's petition for a writ of certiorari should be granted to resolve what standard should be applied to motions to modify injunctions and consent decrees which enjoin the conduct of state and local officials. In the alternative, this Court should grant the petition for a writ of certiorari and remand to the First Circuit for further hearing consistent with this Court's holding in *Dowell*.

C. The Holding In *Dowell* Extends To The Facts Of This Case.

Respondents attempt to distinguish this case from the Court's holding in *Dowell* by claiming that the *Dowell* decision only applies to court-imposed decrees and not consent decrees. This distinction, however, cannot escape the compelling rationale of *Dowell*.

There is no question that a court has the "inherent 'power . . . to modify an injunction in adaptation to changed conditions though it was entered by consent.'" *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 610 (1984) (Blackmun, J., dissenting) (quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932)). The federalism concerns which serve as an underpinning of the holding in *Dowell*, are equally compelling regardless of how the injunction or decree was created. This is especially true where the decree concerns public institutions as compared to private litigants. *Plyler* v. *Evatt*, 846 F.2d 208 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988) (*Swift* standard for modification of consent decrees

is inappropriate in institutional reform litigation because its unique nature and demands necessitate a more flexible approach to modification).

In *Dowell*, which like the present case involved a local governmental body, this Court stated that the changing nature inherent in any public body is an important aspect to consider in determining what standard should be applied.

> The [Swift] test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result.

Dowell, 111 S.Ct. at 630. Similarly, judicial supervision based on constitutional violations attributable to previous sheriffs of Suffolk County should not continue for the indefinite future, once those violations have been addressed. At the least, a consent decree should be treated flexibly where the condition sought to be changed does not implicate a constitutional right.

D. Important Governmental Interests In Ensuring Pretrial Detainees Are Available For Trial And Protecting Public Safety Outweigh Alleged Privacy Interests Of The Detainees.

Respondents argue that allowing double-celling of a portion of the cells would cause serious harm to the plaintiff class by destroying the privacy of the inmates. Res. Opp. at 21-22. However, no such privacy right as defined by Respondents exist. *See Bell* v. *Wolfish*, 441 U.S. at 537 (loss of freedom of choice and privacy are inherent incidents of confinement). Nor was the District Court's decision predicated upon any privacy right of the inmates. Sheriff's Petition at 5a. Moreover, Respondents fail to balance this interest against the important public interest and legitimate government objective of ensuring that pretrial detainees are available for trial, and protecting the public safety.

Respondents also argue that there is no evidence on the record that a dangerous prisoner was ever released due to overcrowding at the jail. Res. Opp. at 23. This argument carries no weight whatsoever. There is uncontroverted evidence on the record that approximately 10% of inmates placed in halfway houses escape custody and end up on the street.[1] Respondents' argument implies that an escaped inmate must first commit a heinous crime to create the legitimate governmental objective of holding securely persons who are committed to the Sheriff's custody on bail. This legitimate governmental objective should not be set aside, reduced or only partially met where, as here, it can be fully met by double-bunking without violating any constitutional standard.

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[1] *Inmates of Suffolk County Jail* v. *Kearney*, No. 90-1440 (1st Cir. 1990), Appendix to Brief for the Defendant-Appellant, Sheriff of Suffolk County, Vol. I, p. 298.

CONCLUSION

In light of the *Dowell* decision, this Court should grant the Sheriff's petition for writ of certiorari and take one of the following actions: (1) summarily reverse the First Circuit based on *Dowell*, (2) hear argument in this Court on what standard to apply to motions to modify consent decrees in institutional reform litigation, or (3) remand the case to the First Circuit for further hearings consistent with the *Dowell* decision.

Respectfully submitted,

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